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 11 UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

12 KEVIN R. MCLEAN,) No. 07-05594 JSW
 13 Plaintiff,)
 v.)
 14 WORLD SAVINGS FSB; INTEGRITY)
 15 INVESTMENT GROUP, LLC; GOLDEN)
 WEST SAVINGS ASSOCIATION)
 SERVICE CO.; SUSAN FEDERIGHI; BILL)
 FORD; JEFFREY FORD; CALIFORNIA)
 FRANCHISE TAX BOARD; WILLIAM L.)
 VEEN,)
 Defendants.)
 19)
 20)
 21)

**MEMORANDUM OF POINTS
 AND AUTHORITIES IN
 SUPPORT OF MOTION TO
 EXPUNGE NOTICE OF PENDING
 ACTION**

**Date: March 7, 2008
 Time: 9:00 a.m.
 Courtroom: Hon. Jeffrey S. White,
 Courtroom 2, 17th Floor**

22 **1. Introduction and Summary of Arguments**

23 Plaintiff filed this action originally on November 2, 2007. The operative pleading is the
 24 First Amended Complaint, filed December 7, 2007, and served in January 2008 on this
 25 defendant. The First Amended Complaint states four claims for relief: To Set Aside a Non
 26 Judicial Sale; Declaratory Relief; to Quiet Title and for Wrongful Eviction. The moving
 27 defendant is a third party purchaser at a foreclosure sale held in October 2007, in which

1 defendant purchased plaintiffs former property, a single family dwelling in Woodside,
 2 California. As to this defendant, the First Amended Complaint claims that the sale should be set
 3 aside due to the “ fraud” of the original lender, World Savings, and the foreclosure trustee,
 4 Golden West Savings Association Service Company. The First Amended Complaint seeks a
 5 declaration that Integrity Investment Group has no interest in the real property and to quiet title
 6 against its interest. It also seeks to restrain pending eviction proceedings in San Mateo Superior
 7 Court, under state law pursuant to California Code of Civil Procedure §1161a.

8 After filing this action, plaintiff recorded a Notice of Pending Action against the disputed
 9 real property pursuant to California law, in support of his state law claims herein.

10 In response to the service of the First Amended Complaint, this Defendant has filed a
 11 motion to dismiss, on, among other things, the grounds that under FRCP Rule 12(b)(1), the court
 12 is without subject matter jurisdiction to hear and determine the claims against this defendant
 13 because there is no federal question or other federal subject matter jurisdiction over the alleged
 14 state law non-judicial foreclosure or eviction action. All other defendants have moved for relief
 15 on the same ground. All motions are to be heard on the date noticed for this motion. Since the
 16 plaintiff cannot establish the jurisdictional facts necessary to remain before this court, the Notice
 17 of Pending Action should be expunged at the same time the case is dismissed.

18 **2. Procedural History and Facts**

19 Defendant originally filed an eviction action on October 19, 2007 in the San Mateo
 20 Superior Court for unlawful detainer under California Code of Civil Procedure § 1161a, to recover
 21 possession of a single family dwelling and land commonly known as 481 West Maple Way,
 22 Woodside, California 94062. (First Amended Complaint [hereafter “FAC”], ¶¶ 32-36 and Exh. E,
 23 F). As the First Amended Complaint alleges, there was a foreclosure sale of the defendant’s
 24 property on October 3, 2007, at which plaintiff, a third party bidder, was the successful purchaser.
 25 Defendant is a hold over owner who is refusing to give up possession. (FAC, ¶¶ 3, 12-18; 33-36
 26 and Exh. B, E and F).

27 The First Amended Complaint alleges unspecified irregularities in the sale (FAC, ¶¶ 4, 17-
 28

1 18; 21; 35) which plaintiff contends violated his “due process” rights, such that it presents an action
 2 “under 42 U.S.C. § 1983.” (FAC, ¶ 10). Plaintiff contends that “selling Plaintiff’s property without
 3 notice is a violation of the Due Process afforded Plaintiff under the Fourteenth Amendment of the
 4 United States Constitution...” (FAC ¶ 10; see also FAC ¶ 35).

5 **3. Expungement of Notice.**

6 In this case, in connection with his state law claims (which are in reality all of the claims),
 7 plaintiff availed himself of California Code of Civil Procedure §§ 405.1-405.4, and recorded a
 8 notice of the pendency of this action on November 5, 2007, as Instrument No. 2007-158458 in the
 9 Office of the San Mateo County Recorder against defendant’s real property commonly known as
 10 481 West Maple Way, Woodside, California 94062. (Declaration of Mark J. Romeo in Support of
 11 Motion, [hereafter “Romeo”], ¶¶ 1-2 and Exhibit 1). The notice has never been served on
 12 defendant. (Id., ¶ 2).

13 This defendant and all other defendants have moved to dismiss this case, which motions
 14 are set for hearing on March 7, 2008. The motions all collectively challenging the basis for federal
 15 question jurisdiction against defendants. Those motions make it clear that this action should not
 16 be “pending” at all.

17 Under California Code of Civil Procedure §405.31, the court may order a notice expunged
 18 where it finds that the plaintiff has not established the probable validity of the real property claim
 19 in the action. Under this statute, defendant submits that the court should order expungement of the
 20 notice of pending action. First, plaintiff has the burden of establishing his jurisdictional facts in
 21 order to remain before the court. The motions to dismiss demonstrate that his claims for relief in
 22 this court will not survive the pleading stage. Therefore, there is no “probable validity” to such
 23 claims. Second, under California Code of Civil Procedure § 405.23, a Notice of Pending action is
 24 “void” if not served on a party. In this case, the notice was not served on Integrity Investments,
 25 which only learn of it through the title report presented to the court. (Romeo, ¶ 2).

26 Under these circumstances, plaintiff cannot establish that this action is probably valid.
 27 Therefore, the motion should be granted, expunging the Notice of Pending Action.

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1 In addition, the court can award attorneys fees to the prevailing party on a motion to
2 expunge a notice of pending action. (Cal. Code Civil Proc. §s 405.38). In this case, the fact that
3 there is no basis for this action to be pending before the court, indicates that the recording is ans
4 was intended to cloud the title of defendant's property and create delay. Therefore, the court should
5 ward defendant the reasonable costs of this motion, or \$900.00. (Romeo¶ 3).

6 **4. Conclusion.**

7 For the foregoing reasons, the court should grant the motion, and expunge the Notice of
8 Pending Action concurrently with the dismissal of the case. The court should award defendant
9 the fees incurred to file this motion.

10 Dated: January 24, 2008

LAW OFFICES OF MARK J. ROMEO

11 By /S/Mark J. Romeo _____
12 MARK J. ROMEO
13 Attorneys for Plaintiff

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